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Before the

FEDERAL COMMUNICATIONS COMMISSION

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MAY 12 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Panacea, Quincy and
Midway, Florida)

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MM Docket 93-229
RM-8296
RM-8463

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY COMMENTS

Leah R. James and John L. James ("WTPS"), successor in interest to Bitner-James Partnership, permittee of Station WTPS(FM), Quincy, Florida, hereby file reply comments to the "Comments on Counterproposal" filed by Catamount Communications, Inc. ("Catamount"), on May 5, 1994. WTPS has separately filed a motion for leave to file this pleading. Catamount's comments raised issues related to WTPS' then pending applications for extension of time to construct (BMPH-930929JG) and for assignment of the construction permit (BAPH-930702GK). Specifically, Catamount argued that WTPS' permit could not be modified to specify Channel 264C3 at Midway, Florida, unless and

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until its construction permit deadline was extended. It also asserted that the then pending assignment application involved issues related to the James' basic qualifications to hold the WTPS permit.

On April 6, 1995, the Chief, Audio Services Division, granted both applications for the assignment of permit (Form 314) and extension of time to construct (Form 307). In doing so, each of the issues raised by Catamount are now moot having been resolved in WTPS' favor.

As for the WTPS application for extension of time to construct, the attached letter of April 6, 1995, from the Chief, Audio Services Division, at note 5, states that "[t]he permittee has shown that no progress has been made in construction for reasons clearly beyond its control." The Commission granted an extension of time for a period of 12 months based on the WTPS consummation which was reported to the Commission on April 17, 1995. Thus, contrary to Catamount's position, there now exists a permit that can be modified to Channel 264C3 at Midway.

As for the basis qualifications issue, the attached Commission letter states at p. 5 "we find that the James' did not engage in misrepresentation.... Thus, the James' did not violate Section 73.1015 of the Commission's Rules... prohibiting misrepresentation or willful material omissions bearing on any matter within the Commission's jurisdiction." The staff letter found that the James' did not engage in an unauthorized transfer

of control as had been alleged and that no material or substantial questions as to the James' qualifications remained warranting further inquiry.

Thus, the James' request to upgrade WTPS and provide a first local service to Midway has been delayed nearly two years through no fault of their own. Rather, the delay has resulted from unfounded allegations raised against their qualifications. The rule making decision to upgrade Channel 264C3 at Midway is uncomplicated^{1/} without any remaining issues that have not been rendered moot by the grant of the WTPS Form 307 and 314 applications and by the earlier withdrawal of Channel 263A for Panacea.

WTPS would like to address one other matter raised in Catamount's Comments. Catamount asserts that WTPS misrepresented the potential increase in its secondary coverage area because WTPS relied on a site which was no longer available to it and which provided coverage to less people than sites subsequently specified by WTPS thereby enabling WTPS to maximize its gain area.

When WTPS filed its counterproposal on September 27, 1993, it did report that the authorized site was no longer available to it and a new site would be proposed. However, WTPS continued

^{1/} As explained in the counterproposal, it is not possible to achieve an upgrade to Class C3 and reach Quincy with a 70 dBu signal due to spacing constraints.

to rely on its authorized site for its gain area analysis for two reasons. First, WTPS had not yet applied for a new site and therefore could not in good faith rely on a site for which it was not ready to propose. Secondly, while WTPS did file for a new site on October 27, 1993, that site was later determined to be unsuitable because a structural analysis of the tower revealed that it could not support the weight of the WTPS antenna. Subsequently, on March 30, 1994, WTPS filed for still another site. Thus, WTPS did not engage in a misrepresentation as to the potential population gain area.^{2/}

Furthermore, the population within WTPS gain area is not decisionally significant. Rather, WTPS has urged the Commission to provide a first local service to Midway (Priority 3) over a third local service to Quincy and a first local service to the smaller community of Panacea consistent with the Commission's policies and priorities. See Revision of FM Assignment Policies and Procedures, 90 FCC 2nd 88 (1982).

^{2/} The alleged discrepancy in population figures noted in footnote 7 of Catamount's Comments -- that WTPS reported a population of 120,702 in the original 1987 application and a population of 98,551 in the September 27, 1993, counterproposal for the same site -- can be accounted for by the fact that the 1987 application was based on 1980 Census Data and the 1993 proposal was based on 1990 Census Data.

Accordingly, WTPS urges the Commission to grant the allotment of Channel 264C3 to Midway and to modify WTPS' permit accordingly. WTPS further requests the Commission to act expeditiously now that this matter is ripe for action.

Respectfully submitted,

**LEAH R. JAMES and
JOHN L. JAMES**

By:


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May 2, 1995

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Washington, D.C. 20554

In Reply Refer To:
1800B2, 8910-BD

6 1995

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In re: WTPS(FM), Quincy, Florida
Application for Assignment of
Construction Permit
File No. BAPH - 930702GK

Application for Extension of
Construction Permit
File No. BMPH - 930929JG

Dear Mr. Lipp:

This is in reference to the above-captioned application for assignment of the construction permit for WTPS(FM), Quincy, Florida,¹ from William J. Miller, Jr., Trustee ("the Trustee"), to Leah R. James and John L. James ("the James'").² This is also in reference to the above-captioned application to extend the construction permit for WTPS. Monte Rex Bitner ("Bitner") filed informal objections to the assignment application on August 13, 1993.³ After consideration of various motions from these two parties,⁴ the Mass Media Bureau requested additional

¹ Channel 264A, 100.7 MHz.

² A construction permit was issued to the Bitner-James Partnership ("Bitner-James") on July 23, 1991 (File No. BPH-870227ME).

³ Bitner's letter is styled as a petition to deny, but it suffers from numerous procedural defects, including lack of service. We will consider the letter as constituting an informal objection under 47 C.F.R. § 73.3587.

⁴ Included among these motions are: (a) Motion to Dismiss (the petition) filed by the James' on Sept. 9, 1993, and (b) Opposition to Motion to Dismiss filed by

information from the James' on March 29, 1994. The James' submitted a detailed response to the request for additional information on May 31, 1994. Additional pleadings followed. Bitner alleges that the James' have misrepresented their ownership of broadcast properties to the Commission, that they have engaged in an unauthorized transfer of control of WGWD, an operating FM station in Florida, and that they intend to assign the license for WTPS shortly after obtaining it. After considering all pleadings, we find that it is in the public interest to deny the informal objection and to grant the above-captioned applications.⁵

Background

Bitner-James was awarded a construction permit to build an FM station in Quincy, Florida after a comparative hearing and approval of a settlement agreement.⁶ Subsequently, Bitner filed for bankruptcy and his interest in Bitner-James was transferred to the Trustee. The involuntary assignment from Bitner to the Trustee was granted on July 23, 1993.⁷ The pending application proposes assignment of Bitner's former 51% partnership interest from the Trustee to Leah James, who holds the remaining 49%, and to her husband, John James.

Bitner on Sept. 20, 1993. These motions constitute unauthorized pleadings under 47 C.F.R. § 1.45(c), which we are not constrained to accept. See Llerandi v. FCC, 863 F.2d 79, 84 (D.C. Cir. 1988). Nevertheless, we are under a statutory obligation to determine that a grant of the subject application is in the public interest. This obligation "demands that we consider all facts presented to us." Service Broadcasting Corp., 46 RR 2d 413, 416 n.3 (1979). Accordingly, we have reviewed the facts presented in these unauthorized pleadings.

⁵ We find that it is in the public interest to grant an extension of the construction permit for WTPS (File No. BMPH-930929JG) in accordance with 47 C.F.R. § 73.3534. The permittee has shown that no progress has been made in construction for reasons clearly beyond its control. Furthermore, the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. The construction permit remains in force for six months from the date of grant. See 47 C.F.R. § 73.3534(d). Should the James' consummate the proposed assignment of the trustee's interest to themselves, they will have 12 months from the date of consummation within which to construct the station. See id.

⁶ Memorandum Opinion and Order, FCC 91M-801, released March 1, 1991.

⁷ Public Notice, Report No. 21686, released July 30, 1993 (File No. BTCH-930625GR).

Discussion

Bitner's claim that the James' misrepresented their ownership interests on their assignment application is based on a civil action filed by the James' against Bitner and others in civil court in Gadsden County, Florida.⁸ We have examined the civil complaint, and based on explanations provided by the James', we are satisfied that they have not misrepresented their ownership interests to the Commission. The James' sought to dissolve a partnership whose assets they claimed rightfully included the construction permit for WTPS, as well as a future right to acquire an interest in WGWD(FM), an operating station in Gretna, Florida.⁹ In the civil complaint, the James' asserted an ownership interest in the partnership along with Bitner, James T. DeVane ("DeVane") and Alvah J. Colson ("Colson").¹⁰ The civil complaint further asserted that Mr. James had been "actively engaged in operating" WGWD for the past year.¹¹

Bitner claims that the James' failed to report their ownership interest in WGWD in response to questions about ownership of broadcast properties on the above-captioned assignment application.¹² In response to these questions, the James' referred to Exhibit 4 of the application. Exhibit 4 states the following:

"Ms. Leah R. James and Mr. John L. James are involved in litigation concerning a claimed right of interest in Station WGWD(FM), Gretna, Florida. The litigation is pending at this time. The parties, Mr. and Mrs. James, are not exercising any rights of ownership or management regarding the station. Should the James' acquire an interest in WGWD as a result of the litigation, they will apply to the Commission for prior approval of such interest."

⁸ James and James v. Bitner, DeVane, Colson and DeCol, Inc., No. 91-1128-CAB (Gadsden County Ct., Fla. filed Nov. 26, 1991).

⁹ Id. at para. 4. Gretna, Florida is located approximately five miles northwest of Quincy.

¹⁰ Id. at para. 3. Commission records list DeCol, Inc. as the licensee of WGWD(FM), with DeVane and Colson each holding a 50% interest.

¹¹ Id. at para. 9.

¹² The alleged motivation of the James' to conceal their ownership in WGWD was to avoid a potential violation of the Commission's multiple ownership rules. See 47 C.F.R. § 73.3555(a) (limiting common ownership of radio stations with overlapping principal community contours). Engineering data indicate that there is an overlap of the principal community contours of these two stations.

Inasmuch as the language in the civil complaint appeared, on its face, to indicate that Mr. and Mrs. James had a present ownership interest in both WTPS and WGWD, the Mass Media Bureau, on March 29, 1994, requested additional information from the James' concerning, inter alia, the partnership agreement and certain contracts referred to in the civil complaint; circumstances surrounding the partnership's control of DeCol, Inc.; and specific details regarding Mr. James' purported operation of WGWD. The James' responded, by letter dated May 31, 1994, that the purported ownership interest in WGWD asserted in the civil complaint was based upon an option contract. The James' explained that an option contract, along with a verbal agreement, was executed on or about January 8, 1991, prior to the grant of the construction permit for WTPS, which contemplated that Bitner-James would have the right to acquire 94% ownership of either DeCol, Inc. or WTPS, subject to Commission approval.¹³ The option was allegedly given in exchange for financing (as co-signer) that Bitner-James provided DeVane and Colson to purchase WGWD from the bankruptcy trustee, Sherwood S. Day, who was holding the license for WGWD. The James' emphasized that "at no time" did they own or operate two stations in or around Quincy, Florida. The James' also stated that Mr. James performed work at WGWD from approximately mid-January 1991 until approximately October 1, 1991, under the supervision and control of the licensee, and that during his tenure at the station, Mr. James had no authority or control over matters pertaining to the station's finances, programming or personnel.

It is the Commission's present policy not to consider unexercised options as attributable interests for purposes of the multiple ownership rules.¹⁴ Here, the James' filed suit in civil court in 1991 to prove the existence of an option contract giving them a future right to acquire a controlling interest in WGWD. Nearly two years later, with the litigation still pending, the James' filed the instant application to assign the construction permit for WTPS from the Trustee to themselves as tenants by the entirety. In an attached exhibit, as noted, they disclosed that they

¹³ The James' have not submitted a copy of the option contract, reporting that it was probably lost when station files were moved at WGWD.

¹⁴ See M & M Broadcasting Co., 26 FCC 37, 73 (Init. Dec. 1958) (noting that an option to purchase property is a "mere privilege to buy given by the owner of the property to another and the optionee is not a purchaser of such property until such time as the option may be exercised."). See also Attribution of Ownership Interests, 97 FCC 2d 997, 1021-22 (1984), recon. granted in part, 58 RR 2d 604 (1985), further recon., 1 FCC Rcd 802 (1986) (warrants, debentures and other convertible interests are not cognizable under the multiple- and cross-ownership rules until converted to an attributable level). Cf. Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Notice of Proposed Rule Making, FCC 94-324, released January 12, 1995.

had "a claimed right of interest in station WGWD(FM), Gretna, Florida." The James' further stated that they were not exercising any rights of ownership or management regarding the station, and that should they ultimately seek to acquire an ownership interest in WGWD as a result of the litigation, they would apply to the Commission for prior approval of such acquisition.¹⁵ Under these facts, we find that the James' alleged option contract did not represent an attributable interest for purposes of the assignment application, and that the James' did not engage in misrepresentation with regard to their alleged ownership of WGWD.¹⁶ Thus, the James' did not violate Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015, prohibiting misrepresentations or willful material omissions bearing on any matter within the Commission's jurisdiction.

We also find that the James' have not engaged in an unauthorized transfer of control of the license for WGWD. Section 310(d) of the Communications Act prohibits licensees and permittees from transferring, assigning or otherwise disposing of licenses or construction permits without FCC authorization.¹⁷ In making a determination whether such an unauthorized assignment or transfer of control has taken place, the Commission traditionally looks beyond legal title and examines who actually controls station finances, personnel matters, and programming. Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

Mr. James has explained that during his tenure at WGWD, he had no authority or control over matters pertaining to the station's finances, programming or personnel. Other than supplying the Commission with a copy of the petition in the civil suit, Mr. Bitner has not provided any evidence that Mr. James was involved in a position of control, or engaged in any behavior that would otherwise raise an issue of unauthorized transfer of control, while employed at WGWD. Therefore, we find that the petition, considered together with the explanations provided by the James', raises no material and substantial question warranting further inquiry.

As a final matter, Bitner has supplied the Commission with two declarations from broadcasters stating that Mr. James told them he had sold WTPS as early as

¹⁵ The local litigation has been dismissed. DeVane and Colson, by letter dated January 25, 1995, state that "[t]here is not now nor has there ever been any ownership by John and Leah James of WGWD."

¹⁶ Bitner has failed to provide probative evidence to the contrary.

¹⁷ See 47 U.S.C. § 310(d); see also 47 C.F.R. § 73.3540(a) (requiring prior FCC consent for voluntary assignment or transfer of control).

mid-1993. Although the Commission abolished its anti-trafficking rule in 1982,¹⁸ permittees proposing to assign a permit for an unbuilt station are required to make a showing under 47 C.F.R. § 73.3597(c) that any payments received for assignment of the construction permit are limited to legitimate and prudent expenses.¹⁹ Thus, in the event the James' file an application to assign the permit for WTPS to a third party, the Commission's rules provide adequate protection to ensure that any such application will only be granted if it serves the public interest, convenience and necessity.

Conclusion

In view of the foregoing and having found the parties otherwise qualified, IT IS ORDERED that the petition to deny IS HEREBY DISMISSED, and when considered as an informal objection, IS HEREBY DENIED. Furthermore, the applications to assign the construction permit for WTPS(FM), Quincy, Florida from William J. Miller, Jr., Trustee, to Leah R. James and John L. James, and to grant a second extension of the construction permit ARE HEREBY GRANTED.

Sincerely,



Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Monte Rex Bitner

¹⁸ See Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), 52 RR 2d 1081 (1982), recon. granted in part, denied in part, 57 RR 2d 1149 (1985) (eliminating the three-year holding period for licenses, in place since 1962, and amending the Commission's underlying "anti-trafficking" policy).

¹⁹ We note for the record that Leah James has made an adequate showing under Section 73.3597 in Exhibit III to the instant application. In pursuit of the construction permit for WTPS, Leah James cites payment of a \$6,000 hearing fee and \$48,000 in approved settlement payments to a competing applicant. The James' propose to pay Bitner-James \$5,000 for assignment of the permit. In accordance with Section 73.3597(c), the proposed payment of \$5,000 is a lesser sum than the legitimate and prudent expenses cited, which total \$54,000.

CERTIFICATE OF SERVICE

I, Veronica Abarre, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., do hereby certify that I have, on this 2nd day of May, 1995, sent by first-class U.S. Mail, postage prepaid, copies of the foregoing "REPLY COMMENTS" to the following:

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* HAND DELIVERED